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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 41.

THE COUNTY OF PRESIDIO, TEXAS, PETITIONER

versus

THE NOEL-YOUNG BOND & STOCK COMPANY.

BRIEF FOR PETITIONER.

T. J. BEALL,
Attorney for Petitioner,
Presidio County, Texas.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 41.

THE COUNTY OF PRESIDIO, TEXAS, PETITIONER,

versus

THE NOEL-YOUNG BOND & STOCK COMPANY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

The Noel-Young Bond & Stock Company, defendant in error, on the 26th day of July, 1904, brought this suit against the County of Presidio, in the State of Texas, plaintiff in error, to recover on certain county bonds, Nos. 90, 91, 92, 94, 95, and 96, and interest coupons attached thereto.

Plaintiff alleges that there are 6 coupons for $80.00 each, payable on April 10, 1896, belonging to and issued in connection with said 6 bonds, each payable on April 10 1897, and the 6 coupons for $80.00 each, payable on April 10, 1898, and the 6 coupons for $80.00 each, payable on April 10, 1899, and the 6 coupons for $80.00 each, payable on April

10, 1900; that all are past due and remain unpaid, and that the principal due on said 30 coupons amounts in the aggregate to the sum of $2,400; that all of said 6 bonds matured and became due and payable on the 6th day of December, 1901, and there being no coupons on them representing the interest accruing after April 10, 1900, there is due upon the same interest at 8 per cent. per annum from April 10, 1900.

That payment of said 6 bonds for $1,000 each, aggregating $6,000, with interest on the same, at the rate of 8 per cent. per annum, from April 10, 1900, and the payment of all said 30 coupons, and interest hereinbefore described, has been duly demanded and all of said bonds and coupons have been duly presented to the Commissioners' Court of Presidio County, Texas, for payment and allowance and all the same have been by the Commissioners' Court of Presidio County heretofore wholly refused and disallowed and the payment of the same has been refused, and said court has refused to recognize said bonds and coupons in any way as just and valid claim against said county; and by the order of said court said county has repudiated any and all liability on said bonds and coupons.

That the principal due on said 6 coupons for the sum of $80.00 each, which fell due April 10, 1896, for $480, and the principal due on said 6 coupons for the sum of $80.00 each, which fell due on April 10, 1897, for $480, and the principal due on said 6 coupons for the sum of $80.00 each, which fell due on April 10, 1898, and the principal due on said 6 coupons for the sum of $80.00 each, which fell due on April 10, 1899, for $480, and the principal due on said 6 coupons for the sum of $80.00 each, which fell due on April 10, 1900, for $480, and the principal due on said 6 bonds, as aforesaid, is $6,000.

That said defendant, County of Presidio, has never paid plaintiff, the legal holder, owner, and bearer of said bonds and coupons, any amount whatever due thereon and prays judgment against said County of Presidio for the amount of

the bonds sued on, to wit, $6,000, with interest on the same at 8 per cent. per annum from April 10, 1900, and for the whole amount of said coupons, with interest on the same at the rate of 6 per cent. per annum from the time they matured respectively, and for costs of suit (Record, pp. 1-5).

The defendant, Presidio County, filed its plea and answer to said action, setting up the following defenses thereto:

1.

A plea in bar of said suit a judgment rendered in the District Court of Presidio County, Texas, on the 28th day of March, 1893, in a certain suit wherein Ball-Hutchins & Co. were plaintiffs, and said Presidio County and the Counties of Brewster, Jeff Davis, Buchell and Foley were defendants, and in which suit the plaintiff sought to recover judgment on the identical bonds sued on in this case, numbered 90, 91, 92, 93, 94, 95 and 96, inclusive, the said bonds purporting to have been issued on the 6th day of December, 1886, by Presidio County, for $1,000, payable to the bearer 15 years after date, with interest at the rate of 8 per cent. per annum, which interest was evidenced by 15 coupons attached to each of said bonds of $80.00 each, each numbered consecutively from 1 to 15, of which coupons the plaintiff, Ball-Hutchins & Co., alleged they were the legal holders and bearers and became so for value before maturity, without notice of any irregularity or infirmity, that affected the validity of either of the said bonds or coupons.

That among other defenses plead by Presidio County in said suit, it was alleged that if said bonds were issued and delivered to plaintiffs, or their assignors, they were so issued and delivered for an unlawful purpose, to wit, for the purpose of furnishing the court-house at Marfa, as per specifications of a certain contract, made out to Britton & Long, for the sum of $7,000, as appears from the proceedings of the Commissioners' Court of Presidio County, dated December 4, 1886; that the order and proceedings of said Commis-

sioners' Court in the issuing and delivering of said bonds for the aforesaid purpose were fraudulent, illegal, and void, and that the contractors to whom said coupons and bonds were issued, and the subsequent holders thereof, had notice of the purposes above stated, for which said bonds were issued; and in said plea it was further alleged that Presidio County, the defendant herein, issued certain bonds numbered 1 to 60, inclusive, for the purpose of building a court-house, with interest coupons attached, which were delivered to J. H. Britton, a contractor; that bonds and coupons for building a jail, numbered 60 to 86, inclusive, were delivered to D. C. Anderson, a contractor; that bonds for the construction of water works, numbered from 87 to 89, inclusive, with interest coupons attached, were issued to J. H. Britton, and that coupons attached to said bonds numbered from 90 to 96, inclusive, the subject-matter of said suit, were issued on the 6th day of December, 1886, and delivered to Britton & Long, contractors, for the purpose of purchasing furniture for the court-house at Marfa; and that if the said County Commissioners' Court had any authority in law to issue bonds for the building of the court-house and jail at Marfa, such power had been exhausted by issuing the bonds numbered from 1 to 86, inclusive, and the interest coupons attached thereto, and that the subsequent issuance and delivery of bonds for furnishing the court-house was without authority of law, fraudulent, and void, and that the proceedings of the Commissioners' Court in relation thereto affected with notice all persons purchasing and dealing in said bonds and interest coupons, and especially the plaintiff in said suit, and that upon issue joining upon said pleadings by the plaintiffs and defendant, as aforesaid, the District Court of Presidio County, a jury being waived on the 28th day of March, 1893, held that said bonds were null and void, and rendered judgment against the plaintiffs, Ball-Hutchins & Co., and that they recover nothing against the defendants, and that the plaintiffs, Ball-Hutchins & Co. should pay all the costs incurred in the

action, and that execution issue therefor, and to the judgment of the court, plaintiffs, by their counsel in open court, excepted and gave notice of appeal.

The defendant plead that the coupons and bonds referred to in the plaintiffs' petition in this suit, are the same bonds to which the coupons were attached that were sued upon in the aforesaid case, in which judgment was rendered against the plaintiffs, Ball-Hutchins & Co.; that the judgment rendered against the plaintiffs in said suit of Ball-Hutchins & Co. *vs.* Presidio County, was thereafter in all things affirmed by the Supreme Court of the State of Texas, on to wit, the 4th day of March, A. D. 1895, and defendant alleged that the aforesaid mentioned suit for the interest upon coupons attached to bonds numbers from 90 to 96, inclusive, are the same identical bonds sued on in this case, except bond No. 93, which is not involved in this suit; that said judgment of the District and Supreme Courts still remain in full force and effect and is in no wise reversed or made void, and said defendant pleads such judgment in bar of this suit and for all costs.

2.

The defendant, Presidio County, further plead in this suit that the plaintiffs ought not to recover upon the said bonds and coupons attached and sued upon in this case, being numbered 90, 91, 92, 93, 95, and 96, because the same were issued and delivered to Britton & Long, contractors, for the fraudulent and illegal purpose of furnishing the court-house at Marfa, which had already been constructed, and because said bonds and coupons attached thereto were issued without any lawful authority; that the power of the county to erect a court-house and jail at Marfa, having been exhausted as appears upon the minutes of the Commissioners' Court of Presidio County on February 9, 1886, recited in the face of said bonds and contract therein mentioned; that the purchasers of the bonds in this suit were put upon inquiry and affected with notice of the fraudulent and illegal character of said

bonds, that is to say, that on the 9th day of February, 1886, as appears from the minutes of Presidio county, an order was entered embodying the following:

First. The bid of Britton to construct the court-house at Marfa, Presidio county, Texas, for $60,000, to be paid in court-house and jail bonds, and that of Anderson to construct the jail at the same place for $26,000, to be paid in the same kind of bonds, which were accepted.

Second. Britton and Anderson were respectively required, within 10 days from February 9, 1886, the date of said order, to enter into contract to construct same.

Third. Work to begin within 20 days from date of contracts and the court-house to be finished within one year, and jail to be finished within six months from date of contract.

Fourth. The bonds were to be of the denomination of $1,000 each, to bear interest at 8 per cent., to run 15 years from their date, and the $60,000 to be delivered to Britton, were to bear same date as his contract to build court-house, $30,000 of them to be delivered when the contract was signed, and $30,000 when the court-house was half finished; and the $26,000 to be delivered to Anderson were to bear same date as his contract to build the jail, $13,000 of them to be delivered to him when the contract was signed, and $13,000 when the jail was half finished.

Fifth. And the county judge was authorized upon behalf of the county to enter into said contract of Britton and Anderson and to issue and to deliver to them, respectively, said bonds as above provided; that 60 of the said bonds, numbering from 1 to 60, inclusive, were dated February 11, 1886, and delivered to Britton, and that 26 of said bonds, numbering from 61 to 86, inclusive, were dated February 15, 1886, and delivered to Anderson; said 86 bonds being for $1,000 each were of the bonds authorized to be issued by said order of February 9, 1886, of the Commissioners' Court, and each bond was in the same words and figures, with the exception of numbers and dates; that on the 6th day of February,

1886, the Commissioners' Court of Presidio County, for the purpose of paying for the furnishing of said court-house and erecting a system of water works for said court-house and jail then already constructed, delivered to Britton & Long 10 bonds numbered 87 to 96, inclusive, which said bonds being numbered and containing the recitals set out in the aforesaid bonds described in plaintiff's petition.

Defendant plead that said order only authorized an issuance of 86 bonds of $1,000 each, and directed that they should be dated within 10 days of February 9, 1886, which was in fact complied with by dating those numbered from 1 to 60 on the 11th, and those numbered from 61 to 86, inclusive, on the 15th day of February, 1886, and delivering them to the contractors respectively, as aforesaid, and the said 10 bonds subsequently issued on the 6th day of December, 1886, thereafter, to which coupons were attached, being the same bonds and coupons involved in this suit, were issued in fact without any order of said Commissioners' Court to support them and are therefore void in law; that the law requires dealers in county bonds to know the provisions of the acts of the legislature, and the order of the Commissioners' Court under and by virtue of which such bonds were issued, whether referred to on the face of the bonds or not; that the said plaintiffs were informed from the act of the legislature, the order of February 9, 1886, purchased by them, to which coupons were attached, that there was a difference of 10 months between the order of the court and the bonds purporting to have been issued thereunder; and whereas the order required the total issue of bonds authorized to be dated within 10 days from February 9, 1886, $60,000 when the court-house contract was signed and $26,000 when the jail contract was signed, and both contracts to be signed within 10 days; that all of said bonds were under said order, and to be delivered before December, 1886, as the court-house was to have been completed within one year, and the jail within six months from the dates of the contracts; and one-half of the

court-house and jail bonds were to have been delivered to the contractors on the signing of the contracts, and the other half when the respective buildings were half completed, and thus requiring delivery of all of the bonds within seven or eight months from February 9, 1886; that the county judge was authorized to sign and deliver the bonds, 60 to Britton and 26 to Anderson; that before the delivery, the said bonds must have been executed by the county clerk and registered by the county treasurer; that the delivery of the said bonds, as aforesaid, satisfied said order of the court of February 9, 1886; that by the numbering of the said 10 bonds on the date of December 6, 1886, offered for sale from 87 to 96, inclusive, evidence the fact that more than 86 bonds were being issued under said order, and that these facts being known were sufficient to put plaintiff upon inquiry as to whether or not these bonds were in excess of the amount authorized by said order, and being thus put upon inquiry as to such facts, it became, and was, the plaintiff's duty to use reasonable diligence to ascertain whether the bonds dated December 6, 1886, offered for sale, were not in fact in excess of the amount authorized to be issued by such order; and the failure of plaintiff to follow up the information which would have led to the discovery of the truth was in law inconsistent with good faith and affected plaintiff with notice of the invalidity of said bonds and coupons attached thereto.

Wherefore, defendant plead that the bonds and coupons sued upon and described in said plaintiff's petition were and are illegal, fraudulent and void.

These two pleas were duly verified by the duly authorized agent of said defendant (Tr., pp. 5-13).

3.

Defendant further plead that each and every one of the coupons sued on by plaintiff, as set out in his petition, were barred by the statute of limitation of four years. The defendant, also, plead a general denial of the facts alleged in

plaintiff's petition, except as to any facts that were admitted to be true in the foregoing pleas.

The plaintiff, the Noel-Young Bond & Stock Company, introduced as evidence on the trial of the case the 6 bonds described in its petition and the 30 coupons sued upon in same, to wit, bonds numbered 90, 91, 92, 94, 95, and 96, all of date December 6, 1886, and all alike in form except their numbers, together with the endorsement thereon.

Plaintiff read from an agreed statement of facts an admission upon the trial of this cause that the 6 bonds sued upon and the 30 coupons above described had been presented to the County Commissioners' Court of Presidio County for payment and were disallowed by said court before the filing of this suit.

The defendant offered and read in evidence from an agreed statement of facts the following portions thereof in substance: The plaintiff's petition in the case of Ball-Hutchins & Co. *vs.* Presidio County, No. 227, filed in the District Court of Presidio County, Texas, on August 15, 1892, in which plaintiff in said cause sought to recover upon certain coupons which matured prior to and on the 10th day of April, 1892, which said coupons were originally attached to the bonds numbered 90, 91, 92, 93, 94, 95, and 96, it being alleged in said petition filed in said cause on August 15, 1892, that Ball-Hutchins & Co. were the owners and legal holders of the 7 bonds and coupons sued upon in said case numbered 227, which were attached to said bonds numbered 90 to 96, inclusive, and that said bonds had been issued by the Commissioners' Court of Presidio County.

The defendant also offered in evidence the answer filed by the defendant Presidio County in said case, setting up the same defenses as are plead in this suit to show the invalidity and illegality of said bonds.

Defendant also read as evidence the judgment of the District Court of Presidio County, rendered in said cause on the 28th day of March, 1893, in which the court, a jury being

waived, held that the bonds aforesaid were void, and the coupons attached thereto, and adjudged that the said defendant should go hence without day and recover all costs incurred in the action, for which execution might issue. To this judgment the plaintiffs by their counsel in open court excepted and gave notice of appeal.

Defendant also offered in evidence the record of the Court of Civil Appeals, as reported in S. W. R., Vol. 27, pp. 702 to 707, in which said Court of Appeals reversed the judgment of the Court of Presidio County, and rendered the same in favor of the plaintiff, Ball-Hutchins & Company.

The defendant also read in evidence the record of the judgment of the Supreme Court of the State of Texas in said cause, in which said Supreme Court of the State of Texas reversed the judgment of the Court of Civil Appeals in said cause and affirmed the judgment of the District Court of Presidio County, the Supreme Court holding in its said judgment and opinion as reported in Volume 88, Texas Supreme Court Reports, 60 to 66, inclusive.

The defendant also offered and read in evidence from an agreed statement of facts in the case of Ball-Hutchins & Company *vs.* Presidio County, the following portions, which are embodied in its bill of exceptions: First, the order of the Commissioners' Court of said county of Presidio of the 9th day of February, 1886 (Tr., p. 14).

Defendant also introduced as evidence the order of the Commissioners' Court of Presidio County of the 8th day of November, 1886 (Tr., p. 24).

Defendant also offered in evidence the following order of the Commissioners' Court of Presidio County, Texas, to wit, Saturday, 4th day of December, 1886:

> "Now, on this day, it is the order of the court that the bid of Britton & Long, to furnish the court-house with furniture, etc., as per specifications of Britton & Long now on file in this court, for the sum of $7,000, be, and the same is hereby, accepted, and that the necessary contract be entered into."

"Now, on this day, it is the order of the court that the payment for the furniture, etc., for the court-house, to be contracted for by Britton & Long, be made in advance, to which order and the order accepting said bid J. H. Catlin, county judge, entered his protest in open court."

Plaintiff then read in evidence the testimony of J. H. Catlin, county judge of Presidio County, as follows:

"That he, Catlin, was county judge on December 4, 1886, and that on or about that date bids were received by the Commissioners' Court of said county to furnish the court-house with good and substantial furniture, such as was necessary to carry on the business of the county. There were two bids received for furnishing said court-house with proper furniture. The contract was awarded to Britton & Long, and in payment of said furniture bonds were issued and delivered to the said Britton & Long, numbered from 90 to 96, inclusive. He, Catlin, as county judge, presided at this meeting of the County Commissioners' Court, and entered his protest of record against the awarding of said contract, but, inasmuch as he was overruled by a majority of the court, he signed the bonds as county judge; that said bonds were issued and delivered to said Britton & Long for said furniture, and said bonds were issued and made out upon the same lithographic blanks which were left over from the original lithographic blanks ordered for bonds for court-house and jail."

Defendant introduced the following order of Commissioners' Court of Presidio County as evidence:

"Now, on this 9th day of February, A. D. 1886, it is the order of the court that the clerk of this court order at once for the use of the county 100 blank court-house and jail bonds to bear interest at the rate of 8 per cent., said bonds to be printed on durable paper or parchment similar to the bonds issued by El Paso County, Texas, said bonds to be in accordance with a form for the same, which is hereby directed to be furnished the clerk by the county attorney of said county."

Defendant then read in evidence a tabulated statement of the bonded indebtedness of the county of Presidio, Texas, showing that under the date of February 9, 1886, there was authorized to be issued 6 of the bonds and coupons attached for the building of the court-house, dated February 11, 1886; and 26 bonds with coupons attached for building the jail, dated February 15, 1886. The bonds aforesaid were for $1,000 each, with interest coupons attached and numbered consecutively from 1 to 86, inclusive, in said registry of Presidio County, Texas, and under the order of the 8th day of November, 1886, three other bonds were issued numbered 87 to 89, inclusive, and dated November 27, 1886, and registered about the same date by the county treasurer, and that other bonds numbered from 90 to 96, inclusive, dated December 6, 1886, were registered by the county treasurer on the same date in said tabulated statement, and these being the bonds sued on in the case of Ball-Hutchins & Company, and in the instant case, except No. 93.

Defendant then read in evidence, by agreement of counsel, the deposition of F. M. Ball, taken in the year 1892, in the said cause, numbered 227, Ball-Hutchins & Co. *vs.* Presidio County, Texas, in which said Ball testified as follows:

> "I am the owner of only four of the bonds, being numbered 90, 92, 94, 96. I have disposed of the others to Mr. J. C. League. I originally bought seven bonds of Mr. John T. Long, who sold me the same in Galveston on December 10, 1886, and when I purchased these bonds all their coupons were attached, they being newly issued. I paid $7,006.22, said price being par and interest. I considered the bonds perfectly good or I should not have bought them; at the time of my purchase I had no notice of any facts affecting the legality of said bonds and coupons, and I received no notice of any other facts connected with the issuance of said bonds, except as recited in said bonds. I purchased said coupons and bonds as an investment, having idle money for that purpose. At the time I purchased the bonds, I made no statement that I was afraid the bonds were illegally

issued, or words to that effect, nor did I make any inquiry as to whether or not there was pending in Presidio County any suits or proceedings as to the illegality of said bonds; nor did I ever see or hear of any advertisment or notice being published in the Galveston Daily News, or other paper, emanating from taxpayers of Presidio County concerning the issuance of said bonds as to their being in any manner illegal. On application at the said office of the said A. H. Belo & Co. for a copy of the Galveston Daily News, containing said advertisement or notice, I was informed that if they had in their possession an issue of the Galveston News containing such advertisement, that they were too busy to furnish me with a copy."

Defendant also introduced in evidence, by agreement, the deposition of J. C. League, which was taken in said cause No. 227, Ball-Hutchins & Co. *vs.* Presidio County, in the year 1892, in which J. C. League testified as follows:

"That he was the owner of the bonds and coupons described in plaintiff's petition; that he could not describe the bonds but that they were the same in description and the same in issue as those bonds owned by F. M. Ball; that he did not have the bonds and could not obtain a copy to attach to his deposition; that he had sold the bonds to which the coupons were attached; that he had purchased the bonds and coupons with F. M. Ball from a party purporting to be the contractor for building the court-house, for which the bonds were issued. That Ball paid for the seven bonds described in plaintiff's petition, and that he paid for three of them with the attached coupons; that he paid full or par value for the bonds and accrued interest at the time he purchased them with attached coupons; that at the time he purchased them he was investing a considerable sum of money in Texas County bonds issued for county and jail purposes; that he purchased the bonds on or about December 10, 1886; that at the time he purchased them, Mr. Ball came into his office with a party representing himself to be of a firm of contractors who had secured

the seven bonds in part payment for building the court-house at Marfa, and that the contractors had agreed to sell all of said seven bonds if taken as a whole; that Ball did not want to invest in more than four bonds, and that he (witness) agreed with Ball to take the other three bonds; that Ball bought the bonds at par and accrued interest. That he questioned the party offering the bonds for sale as to whether there was anything about the bonds affecting their legality, and that the party told him and Ball there was not; that he was never informed, nor did he have any notice of any facts connected with the issuance of said bonds, except as was stated in said bonds; that he purchased said bonds as an investment and was induced to do so because he thought the bonds were good and a safe investment."

Defendant also introduced the deposition of George Sealy, taken by the plaintiffs in the year 1892 in said cause numbered 227 in the District Court of Presidio County, Ball-Hutchins & Co. *vs.* Presidio County, Texas, in which he testified that Ball-Hutchins & Co. were not the owners of the coupons mentioned in the suit, but merely agents for their collection; that the coupons actually belonged on four bonds to Frank Ball and on three bonds to J. C. League, and that the seven bonds mentioned were purchased by Frank Ball on the 10th day of February, 1886, from John T. Long at par and interest, and that Mr. Frank Ball then sold to J. C. League three of said bonds at par with interest.

At the close of the evidence, counsel for plaintiff, the Noel-Young Bond and Stock Company, at the trial of this case, admitted that the coupons sued upon in this case were barred by the statute of limitations of four years, and the court thereupon instructed the jury orally as follows:

"GENTLEMEN OF THE JURY: In this case you will return a verdict in favor of the plaintiff against the defendant, Presidio County, for the amount of the principal sued upon, with interest thereon at the rate of 8 per cent. per annum from the 6th day of December, 1900,"

and the court stated to the jury that the coupons were barred by the statute of limitations.

To which charge of the court, in the presence of the jury and before the jury retired to consider of their verdict, the defendant excepted to that portion of the charge wherein the jury were instructed to return a verdict in favor of the plaintiff against the defendant for the amount of the principal sued upon with interest thereon at the rate of 8 per cent. per annum from the 6th day of December, 1900, on the following grounds:

Because the judgment of the District Court of Presidio County, rendered on the 28th of March, 1893, which was affirmed on error by the Supreme Court of Texas, and in which the bonds sued on in this case were held to be void, was, under the pleadings and evidence in this case, a bar to plaintiff's action.

2.

Because under the pleadings and undisputed evidence in this case the said bonds were issued without lawful authority, the said bonds not being supported by an order of the court of Presidio County, authorizing the issuance of the same.

3.

Because said bonds were issued and delivered to Britton & Long, contractors, for the illegal purpose of furnishing the court house at Marfa, which had already been constructed, and were issued without any lawful authority; the power of the county to issue bonds to erect a court house and jail at Marfa having been exhausted, as appears from an order of the Commissioners' Court of Presidio County, Texas, on February 9, 1886, which is recited in the first of said bonds, and that the contracts mentioned in said order of the court and the registry of said bonds, affected with notice the purchase of the bonds in this suit, that said bonds were issued without authority of law.

The defendant thereupon asked the court to give the following charge:

> "You are instructed that the Supreme Court of Texas having held the bonds sued upon void, and it appearing from the evidence and admission of both parties in court that the interest coupons sued upon are barred by the statute of limitation, you will return a verdict for the defendant."

Which said charge was refused by the court, to which the defendant excepted at the time, on the grounds stated in the foregoing exceptions; and thereupon the jury retired under the oral instruction aforesaid by the court, and rendered a verdict in favor of the plaintiff and against the defendant for the sum of $6,000, with interest thereon at the rate of 8 per cent. per annum from December 6, 1900, and the judgment of the court was rendered upon the said verdict for the sum of $8,316; and to the verdict and judgment thereon the defendant excepted on the ground that under the issues joined and the evidence in the case, the jury should have been instructed by the court to find for the defendant. See bill of exceptions (Tr., pp. 23-50).

The defendant in this action, in connection with its petition for writ of error, made the following

Assignment of Errors.

The United States Circuit Court of Appeals erred in not reversing the judgment for the errors which occurred upon the trial of the cause to wit:

1.

The trial court erred in its oral instruction to the jury, as follows:

> "In this case you will return a verdict in favor of the plaintiff for the amount of the bonds sued upon, amounting to the sum of $6,000.00, with interest at

the rate of 8 per cent. per annum from the 6th of December, 1900, because the ~~lands~~ bonds sued upon had been held void in a former suit by the Supreme Court of Texas."

2.

The court erred in refusing to charge the jury to find for the defendant as requested.

3.

The court erred in refusing to give the following charge asked by the defendant:

> "You are instructed that the Supreme Court of Texas, having held the bonds sued upon void, and it appearing from the evidence and admission of parties in court that the interest coupons sued upon in this case are barred by the statute of limitations, you will return a verdict for the defendant."

4.

The court erred in entering judgment in favor of the plaintiff and against the defendant (Rec., p. 33).

Plaintiff groups the first and second assignments of error and submits the following proposition of law thereunder:

First Proposition of Law.

The judgment of the District Court of Presidio County, rendered on the 28th day of March, 1893, which was affirmed on error by the Supreme Court of the State of Texas, in which the bonds sued on in the instant case were held void, was, under the pleadings and evidence, a bar to plaintiff's action, and the court should have instructed the jury to find for the defendant.

Authorities.

Annie Lewis *vs.* Trustees of Brown Township, Delaware Co., 109 U. S., 162-168.

Ball-Hutchins & Co. *vs.* Presidio County, 88 Tex. Rep., 60.

A judgment is conclusive, not only upon those who are actual parties to the litigation, but also upon all persons who are in privity with them, in law or estate, and a person is bound by a judgment as a privy to one of the parties, when he has succeeded to some right, title or interest of that party in the subject-matter of the litigation.

Black on Judgments, Second Vol., sec. 549.
Calderwood *vs.* Brooks, 28 Cal., 151.
Thompson *vs.* Clarke, 4 Hun., 164.

Second Proposition of Law.

Under the pleadings and undisputed evidence in this case, the bonds sued on were issued without lawful authority, not being supported or authorized by any order of the Commissioners' Court of Presidio County, Texas, and the court should have instructed for the defendant.

Authorities.

88 Tex. Rep., 60.
Caruthers *vs.* The State, 67 Tex., 182.
Francis *vs.* Howard County, 50 Fed. Rep., 62.

Third Proposition of Law.

That said bonds were issued and delivered to Britton & Long, contractors, for the illegal purpose of furnishing the court-house at Marfa, which had already been constructed; and were issued without any lawful authority, the power of the county to issue bonds to erect a court-house and jail at Marfa having been exhausted, as appears from the order of the Commissioners' Court of Presidio County, dated February 9, 1886, which is recited on the face of said bonds, and the contracts mentioned in said order of the court and the registry of said bonds affected with notice the purchasers of the bonds in this suit, that said bonds were issued without authority of law.

Authorities.

Caruthers *vs.* The State, 67 Tex., 132.
Nolan County *vs.* The State, 83 Tex., 183.
Francis *vs.* Howard County, 50 Fed. Rep., 62.
Francis *vs.* Howard County, 54 Fed. Rep., 487.
Davies County *vs.* Dickinson, 117 U. S., 657.
City of Brenham *vs.* Bank, 144 U. S., 173.
Nesbitt *vs.* Independent District, 144 U. S., 610.
Dickson County *vs.* Field, 111 U. S., 83.
Knox County *vs.* Aspinwall, 21 How., 539.
Ogden *vs.* Davis County, 102 U. S., 634.
Sutliff *vs.* Board, 147 U. S., 230.
Lake County *vs.* Graham, 130 U. S., 675.
Buchannan *vs.* City of Litchfield, 102 U. S., 278.
Clabourne County *vs.* Brooks, 111 U. S., 400.
Lewis *vs.* City of Shreveport, 180 U. S., 283.
Dill. Mun. Corp., Sec. 546.

Fourth Proposition of Law.

The order of the court of December 4, 1886, recorded in the minutes of the Commissioners' Court did not authorize the issuance of said bonds, and the undisputed evidence shows that blank lithographic court-house and jail bonds were filled out and delivered to Britton & Long, for the unlawful purpose of furnishing the court-house (Tr., p. —). There is no authority of law, under the constitution and laws of Texas, to issue bonds for the purpose of furnishing court-houses, and payment thereof for the purposes of furnishing court-houses, and payment therefor could only have been legally made out of the general fund.

Authorities.

Revised Statutes, Art. 1527.
Holly *vs.* Hopkins, 74 Tex., 147.
Brown *vs.* Rease, 57 Tex., 318.
Barnett *vs.* City of Dennison, 145 U. S., 141.
Anthony *vs.* Jasper County, 101 U. S., 693.
School District *vs.* Stone, 106 U. S., 183.
Harchman *vs.* Bates County, 92 U. S., 169.
Bates County *vs.* Winters, 97 U. S., 85.
Colar *vs.* City of Cleburne, 131 U. S., 162.
Township of Oakland *vs.* Skinner, 49 U. S., 248.
Martin *vs.* Nesbitt, 86 Tenn., 383.
Lewis *vs.* Barber County, 12 Kan., 186.
Well *vs.* Supervisors, 102 U. S., 625.

Fifth Proposition.

The recitals of the laws, under which the bonds purport to be issued, are not the recital of any facts, but only conclusions of law.

Authorities.

Davis County *vs.* Dickens, 117 U. S., 657.
Francis *vs.* Howard County, 54 Fed. Rep., 487.

ARGUMENT.

The doctrine announced by the Supreme Court in the case of Annie Lewis *vs.* Trustees of Brown Township, Delaware County (109 U. S., 162-168), unquestionably show that plaintiff's suit cannot be maintained, as it was brought by him on said bonds and coupons attached, after all of the coupons were barred by the statute of limitation of four years, and the bonds themselves became due and payable on the 6th day of December, 1901, and his suit was not filed until the 26th day of July, 1904, more than three years after their maturity. The undisputed evidence shows that these identical bonds were adjudged to be void in the hands of the owners and holders thereof, Ball-Hutchins & Company, in a suit brought by that firm against the defendant, Presidio County, on the 5th day of August, 1892, and that said judgment was affirmed by the Supreme Court of Texas (88 Tex., 63). It is not alleged by plaintiff in the instant case that he purchased said bonds for value before maturity, and that presumption will not be indulged in the face of the facts shown in the record, and especially many years after the rendition of judgment, in which they were decided to be void in the hands of a prior owner from whom he must have acquired them.

In the same case of Sage *vs.* The Board of Liquidation of the State of Louisiana (144 U. S., 647), the Supreme Court held that the question whether certain bonds of the State were sold by the governor of the State without authority vested in him by the law, under which they were issued, was purely a question of the construction of a State statute and of the power which was conferred by it upon her agents and was, therefore, not subject to review by the Supreme Court, and in the case of Adams *vs.* The Board of Liquidation of the State of Louisiana the question was presented whether or not a State adjudication upon the fundability of the first bonds

of the State of the same series would be plead in the State court as in estoppel to a subsequent proceeding to the fundability of other bonds of the same series; it was held:

> "Where the board of liquidation appeared to the suit and interposed the plea of *res adjudicata*, based upon the judgment against the bond in the former suit brought by Sage, that the fundability of the bonds was conclusively determined in that case, and that the plaintiffs were estopped. That judgment on appeal was affirmed by the Supreme Court of the State, the latter court placing its decision chiefly on the ground that the fundability of the bonds of the series was determinable in a single suit by the holder of such securities, and those in this suit were held by Sage when he commenced his suit."

On error to the Supreme Court of the United States it is said:

> "The four bonds in this suit are a bar of the same series of 184 bonds issued at the same time as the five bonds which were considered in the suit of Sage *vs.* Board of Liquidation, ante, that suit being brought by him to obtain a right funding of those bonds, and their exchange. The validity of the bonds was the subject of consideration, and it was adjudged that they were not valid obligations of the State. The bonds exchanged for merchandise were considered not to have been issued in strict conformity to law, as required by the laws of the supplementary funding act of Louisiana. The bonds in the case were transferred by Sage to the plaintiffs, while his own suit was pending, but were left in his own hands for collection. The court was of opinion that the judgment as to certain of the bonds of one series determined the character of the same series, and without deciding the terms, the plea of *res adjudicata* interposed by the State, based upon the judgment in the Sage case, held that the fundability of the bonds in this suit was settled by the decision in that case, which is practically applying that doctrine. The transcript of the proceedings of the court below does not present any

> Federal question which authorizes us to review the decision of the State court, nor does the ruling of the court on the validity of the bonds present any question of Federal law, but solely a question upon the construction of the statute of the State, and we think exchange of the bonds for merchandie was a sale within its meaning."

It occurs to us that the principle laid down in the case cited is practically decisive of the question presented in the instant case. The bonds in the former case were exchanged for merchandise, and it is held by the Supreme Court of Louisiana that the bonds on that account were void and not fundable. The bonds in the present case were issued without an order of the Commissioners' Court of Presidio County, and delivered to the contractors for furnishing the courthouse, and it was held by the State court that said bonds were void and this decision was affirmed by the Supreme Court of the State; and it was further held by the Supreme Court of Texas that the purchasers of this series of bonds, Ball-Hutchins & Company, were bound to look to the proceedings and orders of the Commissioners' Court, and were thereby affected with notice of the purpose for which the bonds were issued, and, therefore, were not innocent purchasers for value.

In Turner *vs.* Board of Commissioners of Wilkes County, the Supreme Court held that a Federal question is not raised by a decision of a State court construing a State statute under which bonds were issued, where its decision is based upon the constitution and laws of the State; that the Supreme Court of the United States is bound by the decision of a State court in regard to the meaning of the constitution and laws of its own State (173 U. S., p. 461).

And it is also settled that a Federal question involved in a decision of a State court will not be looked into by the Supreme Court of the United States if there is another ground of the decision by the State court upon which its judgment

can rest, and where it is shown that an alleged contract never existed because of the want of the compliance with the State statute no Federal question is involved (Bacon *vs.* State of Texas, 163 U. S., 205-207).

The Supreme Court of the United States accepts the interpretation of the statute of a State fixed to it by the court of last resort of said State (Missouri, K. & T. Ry. *vs.* McCann, 174 U. S., 580).

And we submit that whether the former judgment of the Supreme Court of Texas, holding the identical bonds to be void upon which the plaintiff now sues be not sustained as a bar under defendant's plea of former judgment, still the Federal courts will follow that opinion which involves a construction of the constitution and laws of the State.

If, however, the Supreme Court of Texas had not adjudged these bonds void, we think the principles announced in the numerous authorities cited in our brief clearly show that the bonds sued on in this case were issued without authority of law and are absolutely void.

The contention of the defendant in error is that as the bonds refer to the act of 1881 and the validating act of 1885, authorizing the several county courts of the State to issue bonds for the erection of court-house and jails, that Presidio county is estopped by the recitals in the bonds. In other words, it is asserted by the defendant in error that the mere recitation of the acts under which the bonds purport to be issued, even though issued in fact for an unlawful purpose, renders them invulnerable to attack in the hands of the purchaser. Unquestionably such a doctrine finds no support in the decisions of our courts. Nor can it be sustained upon reason. It cannot be true that a recital in terms of the act of the legislature conferring power to issue bonds to erect a court-house would validate in the hands of the purchaser bonds confessedly issued for the purpose of furnishing a court-house or giving a free exhibition of fireworks at the expense of the county.

The record evidence in this case undisputably shows that these bonds were issued some ten months after the 86 bonds for erecting the court-house and jail had been delivered to Britton & Anderson by the fraudulent use of the lithographic blanks left over, and for the unlawful purpose of paying for court-house furniture, and that, too, in the face of the protest of the county judge, as appears from the record of the Commissioners' Court.

It has been uniformly decided and is the approved doctrine of the text writers that fraud vitiates everything into which it enters, and that it is not the office of recitals in county bonds to create power, where the law confers none. In Dickson County *vs.* Field (111 U. S., 83) the Supreme Court says:

> "All parties are equally bound to know the law, and a certificate reciting the facts, and that thereby the bonds were conformable to law, when judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law; otherwise, it would always be in the power of the municipal body, to which power was denied, to usurp the forbidden authority by declaring that its assumption was within the law. This would be a clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself."

In Anthony *vs.* Jasper County (101 U. S., 683) it is held that the power to issue county bonds must be conferred by law; that no *bona fides* on the part of the purchasers can dispense with it, and no recitals cure it. In the case cited it is held that the purchaser was charged with notice of the fact that Mervin was not the presiding justice of the county court until October, 1872, and that he could not have signed the bonds in his official capacity, and so we see that the minutes of Presidio County show that Catlin, who signed the bonds in suit pending dated December, 1886, was not the county judge on the date of the order of the 9th of February,

1886, nor at the time the 86 bonds were issued, which exhausted the power of the county court to issue bonds to build the court-house and jail.

In Color *vs.* City of Cleburne (131 U. S., 723) it is held, that the plaintiff was an innocent purchaser of the bonds for value and that he was not bound to look beyond the bonds themselves and the enabling acts authorizing their issue, no matter what irregularity characterized the act of the officers who issued them; that the face of the bonds referred him to art. 423 of the Statute and to the ordinance of September, 1883; that an examination of the said ordinance would show authority to issue the bonds; that the records of the city would show that fact. But an examination of the records of the city would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September 13, 1883, until July 3, 1884, and that Hodge was not mayor on that date, and the bonds were held void in the hands of the *bona fide* purchaser.

In Anthony *vs.* Jasper County (101 U. S., 6-3) municipal bonds were signed and issued in October, 1872, on a subscription made in March, 1872, to the stock of a railroad company, and bore date the day of the subscription. The presiding justice, who signed the bonds, did not become such until October, 1872; thus the person who signed the bonds, when actually issued, signed them, but they were antedated to a day when he was not in office. In this case there was a false date inserted in the bonds in order to avoid the effect of a registration act which took effect between the antedated date and the actual date of signing.

> "Under such circumstances a false date is equivalent to a false signature; and the public in the absence of any ratification of its order is no more estopped by the one, than it would be by the other; antedating under such circumstances partaking the character of a forgery, is always open to inquiry, no matter who relies on it."

In Bissell *vs.* Spring Valley (110 U. S., 162), where bonds were issued by a township in payment of a subscription to railway stock, under a statute which made the signature of a particular officer essential, it was held that without the signature of that officer they were not the bonds of the township, and that the municipality was not estopped from disputing their validity by reason of recitals in the bonds, setting forth the provisions of the statutes and a compliance with them.

Chief Justice Waite remarked in McClure *vs.* Oxford (94 U. S., 429):

> "Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon inquiry he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which upon their faces refer to the statute under which they were issued, is bound to take notice of the statute and of all its requirements. This suit being upon coupons which refer to the bonds, this puts the purchaser upon inquiry for the bonds and charges him with notice of all they contain."

Applying the principle announced in the above case, we insist that as the act cited on the face of the bonds is general in its terms, authorizing the Commissioners' Court of the several counties to issue bonds for specified purposes only, and as the order of the court under which the bonds purport to have been issued was also recited in the face of said bonds, appellee was chargeable in law with the contents of said order, and all that appeared in the proceedings of the court in reference thereto.

In Davis County *vs.* Dickenson, the statute authorized the county court to subscribe for $25,000 of stock in a railroad corporation and to issue bonds therefor. The court issued bonds in excess of that amount, and that fact appeared from the records of the county court in the register which was open to public inspection. The certificate of the judge of the county court, upon the back of each bond, recited that it was issued as authorized by the statute and by an order of the

county court in pursuance thereof. It was held that the county was not estopped to deny that the particular bonds were void, because the court at the time of issuing them had exhausted the power conferred by the act of the legislature (117 U. S., 675-685). See Post *vs.* County of Pulaski, 47 Fed. Rep., 284; also Sutliff *vs.* Lake County, *idem*, 106, in which the same principle is forcibly maintained.

In the case of Northern Bank of Toledo *vs.* Porter Township, the Supreme Court of the United States says:

> "Mere recitals in bonds issued by the officers of a municipal corporation do not preclude an inquiry, even where the rights of a *bona fide* holder are involved as to the existence of legislative authority to issue them."

In view of the doctrine announced in the cases cited, it logically follows that the recital in bonds that they are issued by virtue of an act entitled "An Act to Authorize the Commissioners' Court of the Several Counties to Issue Bonds to Erect Court-Houses," in the absence of any recitals of the purpose for which the bonds are issued, would not estop the county from showing the unlawful purpose for which they were in fact issued. If this be not true, then a recital of the bonds would validate the bonds in the hands of purchasers, even though issued to raise money to entertain a circus, or defray the ordinary expenses of the county, payable in law out of the general fund.

The court will notice that these bonds not only refer to the act of February 11, 1881, and the validating act of 1885, but, also, to the order of the Commissioners' Court of February 9, 1886, and nowhere recite as a fact that "the bonds are issued for the purpose of erecting a court-house or jail."

In this connection we invite the attention of the court to the decision of the United States Circuit Court of Appeals, in the case of Francis *vs.* Howard County, where the effect of

this identical recital in the bonds involved in that suit, was considered and determined. The court says:

> "It is contended that the recital in each bond that, this bond is issued in accordance with the provisions of the act of the Legislature of the State of Texas entitled: 'An act to authorize the County Commissioners' Court of the several counties of this State to issue bonds for the erection of a court-house, and to levy a tax for the payment of same,' approved February 11, 1881, is a recital of the performance of a condition precedent on the part of the County Commissioners' Court. * * * The answer to this contention of the plaintiff in error is, that the recital in the bonds sued on is not a recital of facts, so much as of a conclusion of law; that the bonds contain no express recital of the existence of any fact, and that a fair construction of the act of 1881 leaves the ascertainment of no fact to be found by the County Commissioners' Court as a condition precedent to the issuance of bonds thereunder, but practically leaves the County Commissioners' Court and all purchasers and holders of bonds to act at their peril (54 Fed. Rep., 487). In the same case which was decided in the Circuit Court by Judge Maxey, it was held that the bonds numbered 36, 37, 38 and 40 were void in the hands of innocent purchasers. The court says: 'The Commissioners' Court, November 12, 1883, ordered that there be issued for the purpose of erecting a suitable building for a court-house for said county of Howard * * * thirty-five coupon bonds of the said county of the denomination of $1,000 each, payable to J. H. Millican & Co., or bearer,' etc. No other bonds were then ordered to be issued, and Milliken & Co. were not entitled to any others, or anything else under their construction contract. * * * It was not until February 14, 1884, the order passed 'that the balance of $5,000 court-house bonds, may issue in accordance with law to any one who may agree to take the same.' * * * These bonds were negotiated by County Judge Thurmond in St. Louis, pursuant to the order of September 13, 1886, and were purchased by a citizen for value before maturity. * * * The court

is of opinion that these bonds are absolutely void, on the ground that the county had no power or authority to issue them. The power to issue bonds for the erection of a court-house was exhausted when the 35 bonds were issued to Milliken & Co., and thereafter the county was without lawful authority to issue additional bonds, apparently for court-house purposes but really and in fact intended and used for the purpose of boring an artesian well (Davies *vs.* Dickenson, *supra*). Granted the power under such circumstances to issue bonds purporting on their face to be court-house bonds, the authority would be susceptible of indefinite expansion; and under the pretense of lawful right a court would be enabled to flood the county with negotiable securities, binding upon the people. Such a doctrine is inconsistent with reason, and it is believed finds no support in the principle asserted by the text writers, or as enunciated by judicial tribunals" (50 Fed. Rep., 61-62).

It is impossible to distinguish in principle the case of Francis *vs.* Howard County from the case before the court. The only respect in which they differ is that in the former case the act of February, 1881, is referred to, and the bonds contained no other recital, while in the case before the court the bonds purport to be issued by order of the Commissioners' Court of February 9, 1886. And it is well settled that where a bond or other instrument purports to have been issued by virtue of a certain order named and referred to, but not copied or described, everyone claiming any rights by virtue of that bond or instrument is charged with notice of the contents of the order (See Lewis *vs.* Barbour County, 12 Kansas, 186; Martin *vs.* Nesbitt, 86 Tenn., 383). And especially does this principle apply to county bonds which can only be issued by order of the court, and which the law requires shall be registered by the county treasurer in the proper book kept for that purpose, before they are delivered to the purchaser.

If the purchasers of the seven bonds numbered from 90 to 96, inclusive, had examined the order of the court referred to

in the bonds, they would have ascertained that the power of the court to issue bonds to build the court-house and jail were exhausted when the 86 bonds were issued and delivered to Britton & Anderson under their contract. And being thus put upon inquiry, if they had looked to the order of December 4, 1886, the fact would have been discovered that the particular bonds in suit were issued for the illegal purpose of furnishing the court-house. And as said by the court in Nolan County *vs.* The State (83 Tex., 196-197), the purchasers of the bonds must look to the official assessment in order to determine the authority of the court to issue bonds; so we insist they must look to the contract referred to in the orders of the Commissioners' Court and the treasurer's register of bonded indebtedness of the county to determine the validity of the bonds, and that an overissue in either case would be void.

Appellant relies upon the doctrine laid down in the Nolan County case, *supra,* that the bonds were not issued for the purpose shown in the recitals. The case has no application to the bonds sued on, for the obvious reason, in that case the record shows that "each of said bonds recites upon its face that it was issued for the purpose of erecting a court-house for Nolan County and that it was issued by authority and under the provisions of the act of February 11, 1881," etc., while the bonds under consideration "recite no facts, but only conclusions of law" (Francis *vs.* Howard County, *supra*). And notwithstanding what is said about the recitals in the case of Nolan County, the court held the bonds to be illegal, which were issued in excess of the amount authorized by law. Of course, the validation of bonds referred to, under the act of the Legislature designed to protect the school fund, has no application to the case before the court.

We will not undertake to harmonize the apparently conflicting decisions of the Supreme Court of the United States, as to the effect of recitals in municipal bonds. There seems, however, to be a difference in the doctrine of implied power to issue municipal bonds, and the effect of recitals therein

when considered with reference to those of cities, and of counties. This conflict of the authorities is noticed and commented upon by our Supreme Court in Robertson *vs.* Breedlove (61 Tex., 322), in which the court says:

> "In the Supreme Court of the United States where the point is most frequently raised, the question is in a very unsettled state, and some of the decisions of that court seem difficult to reconcile with each other. It is to be noticed, however, that whenever in that tribunal the power has been sustained, the corporations making the securities have been cities, and not counties."

The court, in speaking of the implied power to issue bonds in the absence of any express authority of law, which must be, in our judgment the basic principle of the binding force of estoppel by recitals in municipal bonds, say: It will be observed in this connection that most of the cases cited by appellant involve the question as to the effect of recitals in the bonds of cities where the provisions of the charter and the ordinances are referred to as authority for issuing the bonds.

This doctrine of implied power, however, is repudiated in Texas in the case of Nolan *vs.* State (83 Tex., 190), where the Supreme Court say:

> "It may be considered settled law in this State that one of its counties cannot issue bonds without an act of the Legislature conferring the power."

And hence in that case the doctrine of estoppel by recitals was not applied to the bonds which were issued in excess of those authorized by law because the power had been exhausted.

It follows, therefore, as a corollary, that in no case can the power to issue bonds be implied for purposes not mentioned in the statute, and that mere agents of the county, clothed with the duty of issuing bonds, cannot by force of recitals

invest themselves with unlimited powers, and thus override the law, and compel the people to pay them. If this doctrine should prevail the purchaser may close his mind to inquiry as to the power to issue them, and rely with confidence upon the mere recitals for protection; and there could be no security or safety to the tax-payer against the unlawful, fraudulent, or excessive issue of bonds. Such a rule would unquestionably nullify the laws of our State, encourage, if not produce the very mischiefs they were intended to prevent, lead to wasteful and oppressive taxation, and result in financial ruin to the people of many of the counties of our State.

We respectfully submit that this case should be reversed and rendered in favor of the plaintiff in error.

T. J. BEALL,

Attorney for Petitioner, Presidio County, Texas.

No. 256.

Supreme Court of the United States

OCTOBER TERM, 1907.

COUNTY OF PRESIDIO, TEXAS,

Petitioner.

VERSUS

THE NOEL-YOUNG BOND & STOCK CO.,

Respondent.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT.

To the Hon. Supreme Court of the United States:

The respondent, the Noel-Young Bond & Stock Co., recovered judgment on October 3, 1905, in the U. S. Circuit Court, N. D. T. at Abilene, Texas, for $6000.00, being the amount of

Presidio County Courthouse and Jail Bonds, numbers 90, 91, 92, 94, 95 and 96, of date December 6, 1886, (see judgment Pr. Tr. 35, and description of bonds Pr. Tr. 20.) The case was taken by writ of error by Presidio County to the U. S. Circuit Court of Appeals for the Fifth Circuit at New Orleans, which court affirmed the judgment of the trial court on December 15, 1906. (Pr. Tr. p. 37.)

The case was presented by the plaintiff in error, Presidio County, Texas, in the U. S. Circuit Court of Appeals, on four assignments of error (Pr. Tr. 33-34), which were as follows:

First: The court erred in its oral instructions to the jury as follows: In this case you will return a verdict in favor of the plaintiff for the amount of the bonds sued upon, amounting to the sum of $6000.00, with interest at the rate of 8 per cent per annum from the 6th day of December, 1900.

Second: The court erred in refusing to charge the jury to find for the defendant as requested.

Third: The court erred in refusing to give the following charge asked by the defendant: You are instructed that the Supreme Court of Texas having held the bonds sued upon void, and it appearing from the evidence and admission of the parties in court that the interest coupons sued upon in this case are barred by the statute of limitations, you will return a verdict for the defendant.

Fourth: The court erred in entering a judgment in favor of the plaintiff and against the defendant.

Plaintiff in the trial court sued for the interest coupons for the years 1896 and 1900; and it was admitted upon the trial that they were barred by the statute of limitations, and the trial court so charged the jury (see Pr. Tr. p. 30); and the 3rd

assignment of error above mentioned stripped of this mere recital, would read as follows:

"The court erred in refusing to give the following charge asked by the defendant: 'You are instructed that the Supreme Court of Texas having held the bonds sued upon void—you will return a verdict for the defendant.'"

We insist that under the rulings to which we will refer, this assignment of error is in fact no assignment of error, as it does not designate or specify any particular error whatever.

We now respectfully submit:

First: *That the judgment of the Circuit Court of Appeals should not be reviewed by this Honorable Court, for the reason that there was no assignment of error filed in the trial court and presented in the Circuit Court of Appeals, as required by its Rule No. 11, setting out separately and particularly, or designating specifically, any alleged error upon which the petitioner, Presidio County, now relies in this case; and this Honorable Court cannot say that upon the assignments of error presented in the Circuit Court of Appeals, that court erred in affirming the judgment of the trial court.*

See case in point Saltonstall vs. Birtwell, 164 U. S., p. 70.

Rule No. 11 of the original rules of all the Circuit Courts of Appeal (being also Rule No. 11 of the 5th Circuit) declares, "That plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. Such assignment of errors shall form part of the transcript of the record, and be printed

with it. When this is not done, counsel will not be heard, *and errors not assigned according to this rule will be disregarded,* but the court at its option may notice a plain error not assigned (see original rules, all circuits, 90 Fed. Rep. p. CXLVI; and rules, 5th Cir., 90 Fed. Rep. p. XCI.)

In considering such an assignment of error as the 3rd in City of Findlay vs. Pertz, 43 U. S. App. p. 383, the Circuit Court of Appeals for the 6th Circuit, said: "It is altogether too broad and general, under the 11th rule of this court, to bring up any such specific objection as is now sought to be raised," citing G. T. Ry. Co. vs. Ives, 144 U. S. p. 408-415, and the numerous cases we cite herein show that this is the uniform holding of the Circuit Courts of Appeal.

The assignments of error above copied all amount to the same general statement or proposition, that the trial court should have instructed the jury and rendered a judgment in favor of the defendant, and not in favor of the plaintiff. The following cases hold that such assignments of error ought not to be considered, and that the Circuit Court of Appeals was not required to consider them:

In Stevens vs. Gladding et al, 19th Howard (U. S.) p. 64-5, our Supreme Court held, where such an assignment of error was urged, that the plaintiff in error had not taken "the necessary steps to protect his interests," and that the assignment should not be considered; and the judgment of the trial court was affirmed.

See also Deitsch vs. Wiggins et al, 15th Wallace (U. S.) pp. 539-547, and Grand Trunk Ry. Co. vs. Ives, 144 U. S. pp. 408-434.

In Lloyd vs. Chapman, 93 Fed. Rep. 599 (9th C. C. A.) the court said, referring to Rule No. 11 of the Circuit Court of Appeals, that the filing of an assignment of error in obedience to the rule "is made an essential condition to the granting of a writ of error, and its purpose has been many times stated by the court."

In Doe vs. Mining Co., 17th C. C. A., p. 196 (70 Fed. 456) the same court said that the purpose of the rule "is to apprise the opposite counsel and the court of the *particular* legal points relied upon for a reversal of the judgment of the trial court."

In McFarlane vs. Golling, 22 C. C. A., p. 23-24 (76 Fed. 24) (7th Circuit Court of Appeals), the court said, referring to Rule No. 11, that "the rule was designed to bring into the record (at the time the writ of error was sued out) a separate and particular statement of each error asserted and intended to be urged; and to a large extent the rule is a nullity if under general and indefinite specifications like those quoted the appellant may be able afterward to bring forward objections to the decree of judgment which, when error was assigned, had not been thought of." The court further says that "it should not be necessary to look to the appellant's brief to learn the meaning of his assignment of errors."

In Hart vs. Bowen, 31 C. C. A., p. 31 (86 Fed. 877) our Circuit Court of Appeals, Fifth Circuit, in referring to a general assignment of error such as we are discussing, said: "It is too general and indefinite, and but for the briefs of counsel we should be at a loss to know the specific error or errors presented for review. Sooner or later some important case that should be reversed on error will be affirmed, simply because counsel will not heed the rules of this court in regard to point-

ing out in the assignment of errors the specific errors on which they rely."

In L. A. & M. R. Co. vs. Board of Levy Commissioners, etc., 31 C. C. A., p. 121 (87 Fed. 594) our Circuit Court of Appeals, Fifth Circuit, held that assignments of error that in substance amount only to the statement that the rial court erred in deciding the case for the opposite party, are not specific enough to demand consideration.

In Oswego Township vs. Travelers Ins. Co., 8th Cir., 17 C. C. A., p. 77 (70 Fed. 225) the court held that an assignment of errors such as we are discussing "brings nothing to the attention of the appellate court."

In Supreme Lodge of K. of P. vs. Withers, 32 C. C. A., p. 182 (89 Fed. 160) our Circuit Court of Appeals for the Fifth Circuit in referring to an assignment of errors such as we have under discussion, said: "These assignments of error amount to no more than the complaint that the judge erred in deciding the case," and were not in compliance with Rule No. 11.

In Grape Creek Coal Co. vs. Farmers Loan & Trust Co., 63 Fed. Rep. 891 (C. C. A., 7th Cir.) the court held that under Rule No. 11, requiring the error urged to be set out separately and particularly, that "an assignment of error cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question sought to be presented."

In Van Gunden vs. Iron Co., 3 C. C. A. 294 (52 Fed. 838) the Circuit Court of Appeals (4th Cir.) held that the purpose of Rule No. 11 is to have the matter raised by the assignment of error so presented that the court may understand what is the question it is called upon to decite, without going beyond the assignment itself. (In this connection, see also Guggenheim vs. Kirchhofer, 14 C. C. A. (2nd Cir.) p. 72.)

In U. S. vs. Ferguson, 24 C. C. A., p. 1 (78 Fed. 103) the Circuit Court of Appeals for the Second Circuit, said, in referring to assignments of error such as we have under consideration, that they could not be considered, as they did not comply with the rules; and after citing some of the cases to which we have referred, the court says: "As was said by the Circuit Court of Appeals for the Seventh Circuit, in Grape Creek Coal Co. vs. Farmers Loan & Trust Co., 12 C. C. A., p. 350, an assignment of error cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented."

We ask how, under Rule No. 11, to which we have referred, as interpreted by this honorable court and by all of the circuit courts of appeal, this third assignment of error could be evolved into the 9th proposition presented in the petition for certiorari? Which 9th proposition is as follows:

"The judgment of the District Court of Presidio County, rendered on the 28th day of March, 1893, in the case of Ball, Hutchings & Company vs. Presidio County, which was affirmed on error by the Supreme Court of the State of Texas, was a bar to plaintiff's action; because the coupons sued upon in said case were attached to said bonds at the time of said suit, and are the identical bonds sued on in the instant case, the validity of which was put in issue directly by the pleadings and agreed statement of facts, and held to be void by the District Court, which said judgment was affirmed by the Supreme Court of the State of Texas on error, and the respondent in this case having acquired said bonds, subsequent to the institution of said suit, and being privy and successor to the rights of property of the

owners of said bonds at the institution of the former suit and the judgment rendered therein, is conslusively bound by said judgment."

This 9th proposition suggests some facts, and suggest some things that are not facts; and we submit that there is not a point in it that is suggested by the 3rd assignment of error, which was presented to the U. S. Circuit Court of Appeals.

If we were bound by any judgment, what judgment was it? Not the judgment of the District Court of Presidio County, and there is no suggestion in the assignment of error about the judgment of the District Court of Presidio County. If we were bound at all, we were bound by the judgment of the Supreme Court of Texas; but in what respect? On account of its conclusion as to a question of law, or on account of its finding of fact, and if on account of its finding of fact, what was it? This 9th proposition states that we were bound because the coupons sued upon in the case of Ball, Hutchings & Co. were attached to the bonds involved in this suit; but the Supreme Court of Texas does not find that they were attached to the bonds in this suit, but states that they were originally attached to same (see 88 Tex. p. 64). The bonds sued upon by the Noel-Young Bonk & Stock Co. were never sued upon by Ball, Hutchings & Co., and there is no pretense that these bonds ever belonged to Ball, Hutchings & Co. Where is there any suggestion in this 3rd assignment of error that the respondent in this case acquired the bonds sued upon subsequent to the institution of the suit of Ball, Hutchings & Co. against Presidio County? And we ask, where is there any suggestion in the 3rd assignment of error that the respondent, the Noel-Young Bond & Stock Co., was privy and successor to the rights of property of the owners of

these bonds at the time of the institution of the suit by Ball, Hutchings & Co. against Presidio County?

We claim that this whole 9th proposition is the result of difficulties which grew out of the way Presidio County, by her counsel, presented her case in the Circuit Court of Appeals, and that the mistaken idea upon which the case was presented there is that embodied in the 11th proposition of the petition for certiorari in this case, which was that "the rights of the holders of county bonds are determinable by the law of the state as it was declared by the state court to be at the time the bonds were issued and put on the market." There is really no such question arising in this case, and there never has been any question in this case, involving the construction or application of the Constitution of Texas, or any statutory law of the state; and this 11th proposition is based upon the idea that a holder of county bonds is bound, when he receives the bonds, by the holding of the courts of Texas as to questions of commercial law. At the time the bonds sued upon *were issued* the Supreme Court of Texas had declared the law to be just as the trial court and Circuit Court of Appeals held in this case. (See 83 Tex., p. 194-195.)

Before proceeding further, we desire in this connection to call this honorable court's attention to the *"confusion of judgments* and *confusion of facts* in Presidio County's petition for the writ of certiorari. It will be noted that there were three judgments in the state court,—one in the District Court in favor of Presidio County, one in the Court of Civil Appeals at San Antonio in favor of Ball, Hutchings & Co., and the third in the Supreme Court of Texas in favor of Presidio County. The final judgment,—that of the Supreme Court,—does not re-

fer in any way whatever to the owners of the bonds that are sued upon in this case. There is no finding in that judgment that the bonds belonged to Frank Ball and J. C. League; and no intimation in the judgment of our Supreme Court to the effect that Frank Ball and J. C. League were connected with the litigation in any way whatever (see opinion of Sup. Ct., 88 Tex., pp. 63-66.) But in the petition for certiorari (on page 10) counsel for petitioners say: "In the record of the proceedings of the Court of Civil Appeals, it appears that the court found in its conclusions of fact that Ball, Hutchings & Co., plaintiffs in said suit, held the coupons attached to the seven bonds for collection, as agent for Frank Ball and J. C. League." Now we ask, what has the judgment of the Court of Civil Appeals to do with this case? Can it be claimed that anyone is bound by its judgment? If so, then Presidio County is bound, because the judgment of that court was against Presidio County. How can it be even suggested that anybody could be bound in the case, in any way, by the finding of a court whose judgment was reversed? The Supreme Court of Texas does not even intimate in its opinion that Frank Ball and J. C. League had anything whatever to do with the case. (See 88 Texas, p. 63-66.)

What specific or particular point would be raised by the mere suggestion in the special charge mentioned in the third assignment of error, that the Supreme Court of Texas had held these bonds void? It may have held and it did hold upon a mistaken view of a question of commercial law, that the holder of certain interest coupons was bound to know that they had no order of the commissioners' court to support them; but a Federal Court would not be bound by the state court's holding

on a question of commercial law. The holding of the State Supreme court in Ball, Hutchings & Co. vs. Presidio County, that "a dealer in county bonds is bound to know the contents of the order of a commissioners' court authorizing their issuance," has been repudiated by this honorable court, and every Federal Court that has ever passed upon the matter.

If we confine ourselves to the record as made in the trial court, we will see that this false proposition of commercial law was the very thing that was in the mind of counsel at the time the case was tried, and the assignments of error filed. The plea referring to the judgment of the Supreme Court of Texas is based upon the idea that the holding against Ball, Hutchings & Co. upon the interest coupons, *as to this abstract question of commercial law*, would bind all persons whomsoever that might own the bonds, without regard to their relation to Ball, Hutchings & Co. (see Pr. T. 8-9-10); and that anyone buying the bonds would be bound to know that they were issued by order of the commissioners' court of Presidio County for an unlawful purpose, to-wit: for furnishing a courthouse. The brief filed for Presidio County in the Circuit Court of Appeals shows that this was the idea that was in the mind of counsel.

There is no hint in the whole record as the case was brought to the Circuit Court of Appeals, as to their being any privity between Ball, Hutchings & Co. and the Noel-Young Bond & Stock Co., either directly or indirectly; and there is no hint that the Noel-Young Bond & Stock Co. were bound on account of any privity by the conclusion of the Supreme Court of Texas, that the interest coupons were voidable in the hands of Ball, Hutchings & Co.

If this honorable court should conclude that the judgment of the Circuit Court of Appeals should be reviewed,—that court having before it only the too general assignments of error, to which we have referred,—we respectfully submit the following propositions:

FIRST PROPSITION.

The plea of former judgment relied upon by Presidio County in the trial court being simply as to the alleged collateral fact that the interest coupons had been held void upon the ground that the coupons (and bonds) had been issued for an unlawful purpose, to-wit: to buy furniture, it should be construed strictly, and should have been framed with great certainty, and cannot be aided by intendment, and the proof should have corresponded with the allegation made.

PROPOSITION SECOND.

The plea of former judgment relied upon by Presidio County in the trial court being simply as to the alleged fact that the interest coupons had been held void upon the ground that the coupons (and bonds) had been issued for an unlawful purpose, to-wit: to buy furniture, this plea as to this collateral fact was not established by the judgment of the Supreme Court of Texas, which did not decide that point, but simply decided that the interest coupons were void because they had no order of the commissioners' court to support them.

PROPOSITION THIRD.

The Supreme Court of Texas having found that the interest coupons had no order of the commissioners' court to sup-

port them, and Presidio County having plead in the case at bar, on the bonds, that the bonds were issued by and under an order of the commissioners' court, of date December 4th, 1886, (but for an unlawful purpose), under the pleading of Presidio County in the case at bar the judgment of the Supreme Court of Texas was not conclusive, the fact plead being the very contrary of the fact found by the Supreme Court of Texas.

In the case at bar, instead of pleading that it was plead and determined in the case of Ball, Hutchings & Co. against Presidio County that the coupons sued upon by Ball, Hutchings & Co. were issued without any order of the commissioners' court of Presidio County to support them, it was set up in defendant's first amended original answer in this case, on which the case was tried, (Pr. Tr. 8-9) "that it was plead by defendant, Presidio County, in the case of Ball, Hutchings & Co. against Presidio County, that the bonds and coupons were issued by an order of the commissioners' court of Presidio County, of date December 4, 1886, for the purpose of furnishing the courthouse at Marfa," and that "the order and proceedings of said commissioners' court in issuing and delivering said bonds for the aforesaid purpose, were fraudulent, illegal and void; and that the issuance and delivery of the bonds for furnishing the courthouse was without authority of law, fraudulent and void, and that the *proceedings of the commissioners' court* in relation therto affected with notice all persons purchasing and dealing with said bonds and interest coupons, and especially the plaintiff, Ball, Hutchings & Co."; and that "upon issue joined upon said pleadings, the judgment of the District Court was in favor of Presidio County, and said judgment was afterward affirmed by the Supreme Court of Texas." The judgment

(opinion) of the Supreme Court of Texas, reported in 88 Texas Reports, pp. 63-66, does not determine or decide any such point; but by referring to same, this honorable court will see that the whole judgment is based upon the finding that the interest coupons sued upon had no order whatever of the commissioners' court of Presidio County to support them. It would be useless to cite authorities upon the point that the facts alleged in a pleading and the proof must correspond.

In the City of Aurora vs. West, 74 U. S., pp. 82-107, this honorable court says: "When the record of a former judgment is set up as *establishing some collateral fact* involved in a subsequent controversy, it must be plead strictly as an estoppel; and the rule is that such a pleading must be framed with great certainty, and it cannot be aided by any intendment."

In Russell vs. Place, 94 U. S., p. 606, in a case where an attempt was made to plead a judgment in bar, this language is used: "According to Coke an estoppel must be certain to every intent; and if, upon the face of the record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when plead and nothing conclusive in it when offered in evidence.

In Lyon vs. P. & G. Mfg. Co., 125 U. S., pp. 698-702, the court said: "It is well settled that in order to render a matter *res adjudicata,* there must be a concurrence of the four conditions, that is: (1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity of the quality in the persons for or against whom the claim is made."

Pleadings in estoppel must be certain in every particular. Estoppels must be plead with great particularity and precis-

ion, leaving nothing to intendment. *Since an estoppel forbids a party to plead the truth,* it should be set out with more certainey than will avail in any ordinary defense (see Stephens on Pleading, Sec. 353; Bliss on Code Pleading, 2nd Ed., Sec. 364.)

No estoppel is to be taken by inference or argument, but must be a *precise* affirmation of that which makes it. (See Field's Estate, 2nd Rawle (Pa.) p. 357.)

Where a former judgment is plead in bar it cannot be so availed of unless the parties appear to be the same or are averred to have been privies in interest or estate. (See Greeley vs. Smith, Fed. cases 5749; same case, Fed. cases 5750.)

The defense that in an action by one K against plaintiffs, they set up the same matter and cause of action, and that K had verdict and judgment, is bad as not showing privity between K and the defendants. (See Goddard vs. Benson, 15 Abbott's Practice, 191.)

Where an estoppel is replied upon, it must be plead with particularity and precision. In such plea nothing can be supplied by inference or intendment. (See Sims vs. Frankfort, 79 Ind., 446; Crandell vs. Gallup, 12 Conn., 373; Texas Banking Co. vs. Hutchins, 53 Texas, p. 61.)

Where the matter relied on is not specially and precisely alleged, it will be no estoppel. (See Guild vs. Richardson, 6th Pickering (Mass.) 364; Crandell vs. Gallup, 12 Conn., 365.)

The estoppel must be plead fully and sufficiently in all respects and with all necessary incidents. (See Meiss vs. Gill, 44 O. St., p. 253; Fleener vs. Claman, 112 Ind., 288.)

The plea of former adjudication, which is to be found on pages 8, 9 and 10 of the printed transcript, does not allege any-

thing about the ownership of the bonds on which the judgment in the case at bar was obtained, and does not allege who was the owners of the bonds at the time said judgment was obtained in 1893, and does not allege or intimate in any way that the owners of the bonds at that time were connected in any way whatever or affected in any way whatever with the suit of Ball, Hutchings & Co. against Presidio County, and does not allege that the owners of the bonds were at that time in any way whatever affected by the judgment in the case of Ball, Hutchings & Co.

There is no intimation in this record or in any record that was introduced in evidence, as to whether Ball, Hutchings & Co. was a corporation or a partnership. The allegations are simply to the effect that Ball, Hutchings & Co. brought the suit in the District Court of Presidio County, and that the judgment was rendered in that court against them. From the pleadings of the defendant below and from the documents introduced in evidence, the presumption would be we think, if there is any presumption, that Ball, Hutchings & Co. was a corporation.

We remark again that in the case of Ball, Hutchings & Co. against Presidio County, when the judgment of the District Court of Presidio County was affirmed, the Supreme Court of Texas based its reasoning altogether upon the finding that the coupons upon which suit was brought by Ball, Hutchings & Co. "had no order of the commissioners' court of Presidio County to support them and were consequently void." The court argues from the date of the bonds and from their numbers, a purchaser of bonds in open market ought to have known that the bonds could not have been issued under the order of February 9, 1886.

After finding that the ten bonds to which the coupons sued upon by Ball, Hutchings & Co. had been attached were issued "in fact without an order to support them, and therefore in law void," the court proceeds to argue that they were not the bonds in fact of Presidio County, not having been issued by the county. In other words, they were never issued by authority of the commissioners' court of Presidio County. There was no evidence introduced in this case of Ball, Hutchings & Co. vs. Presidio County as to what was actually done by the commissioners' court of Presidio County in December, 1886, when the seven bonds sued upon in the case at bar were issued, but on the trial of the case at bar it was shown directly and positively and plead by Presidio County that the seven bonds were issued by authority of and on account of their issuance having been ordered by the commissioners' court of Presidio County. (See order of commissioners' court Pr. Trans. p. 25 at bottom); and this was supplemented by the testimony of J. S. Catlin, who was the County Judge of Presidio County at the time the seven bonds sued upon in the case at bar were issued, and who testified as follows: "That bids were received by the commissioners' court of Presidio County about Dec. 4, 1886, for furnishing the court house; that the contract was awarded to Britton & Long, and in payment for the furniture, bonds were issued and delivered to the said Britton & Long, numbers 90 to 96, inclusive. He, Catlin, as County Judge, presided at this meeting of the commissioners' court, and entered his protest of record against awarding said contract, but inasmuch as he was overruled by a majority of the court, he signed the bonds as County Judge, and said bonds were issued and delivered to the said Britton &

Long in payment of said furniture. (Pr. Tr. p. 26.) No question whatever was raised upon the trial of this case in the U. S. Circuit Court at Abilene respecting the admissibility of this testimony of J. S. Catlin, the County Judge. We may remark incidentally that such evidence has been held altogether competent. (See in this connection Dillon on Municipal Corporations, Vol. I, Sec. 237.)

State vs. Burkholder, 22 Pac. Rep., p. 724.

Am. & Eng. Encyc. of Law (2nd Ed.) Vol. 7, p. 985.

Erving vs. Duncan, 81 Tex., p. 235 and cases cited.

Pickett vs. Abney, 84 Tex., p. 647.

But argument or authorities on this point are unnecessary for the reason that in the very plea of former judgment upon which Presidio County relied, it is alleged that the bonds were issued by an order of the commissioners' court of Presidio County, of date December 4, 1886, but for an unlawful purpose. (See Pr. Tr. p. 8.)

All the evidence introduced shows positively that the suit of Ball, Hutchings & Co. against Presidio County was pending in 1892. F. M. Ball testified that he was the owner of four of the bonds, 90, 92, 94 and 96. That he had disposed of the others to J. C. League. He testified positively and directly that he bought all seven of the bonds without any notice whatever of any irregularity in their issuance, believing that they were altogether legal; and that he paid the face value of the bonds, with the accrued interest at the time he purchased them. (See Pr. Tr. p. 27.) J. C. League testified that he was the owner of the bonds and coupons described in the plaintiff's petition (meaning evidently that he was the owner of them at one time.) He proceeds to say that he had sold the bonds to which the

coupons were attached; that he purchased the bonds and coupons for value without any notice whatever of an irregularity in their issuance, and paid for them their full or par value with accrued interest. (Pr. Tr. p. 27.)

It is evident that this testimony of F. M .Ball and J. C. League was introduced by Ball, Hutchings & Co. on the trial of their case against Presidio County to show that they had acquired the coupons upon which the suit of Ball, Hutchings & Co. was based from parties, or through parties, who had acquired the bonds and coupons for value before maturity without notice, and of course if they had acquired said coupons from parties who had previously acquired the bonds and coupons in open market for value, without notice, they would be protected unless chargeable with notice as a matter of law, whatever Ball, Hutchings & Co. may have actually known at the time they purchased the coupons sued upon. There was no pleading and no point made that there was a defect of parties in the case, and that Ball, Hutchings & Co. were not the owners of the coupons.

As we have already said, there is no pleading whatever in the case at bar to the effect that Frank Ball and J. C. League were in any way connected with or in any way bound by the judgment in the case of Ball, Hutchings & Co. vs. Presidio County, and no pleading to the effect that the plaintiff below, the Noel-Young Bond & Stock Co., was in any way bound by the judgment on account of the fact that it had purchased the bonds from Frank Ball and J. C. League or from their assignees, or to the effect that the plaintiff had purchased the bonds from Ball, Hutchings & Co., or their assignees, after the suit was commenced by Ball, Hutchings & Co. against Presidio

County in the District Court of Presidio County. (See in this connection Andrews vs. National F. & P. Works, 42 U. S. App., 281, and cases cited.)

The plea of the defendant below, insofar as the matter of the former judgment in the case of Ball, Hutchings & Co. vs. Presidio County is concerned, if analyzed, amounts absolutely to nothing more than the proposition as we have already suggested, that as the Supreme Court of Texas had held the coupons upon which suit was brought by Ball, Hutchings & Co. against Presidio County, void, upon a ground (not supported by the judgment of the Supreme Court of Texas) this judgment of the Supreme Court of Texas as to the invalidity of the coupons, affected and bound every person whomsoever that might then have owned any of the bonds.

PROPOSITION FOURTH.

Under repeated rulings of this honorable court, the judgment of the Supreme Court of Texas on certain interest coupons (maturing prior to 1893) could under any circumstances only be a bar in this action on the bonds (maturing in 1901) as to the point ACTUALLY LITIGATED AND DETERMINED by the Supreme Court of Texas; and Presidio County having plead the fact as a bar that the Supreme Court of Texas had determined that the bonds were issued by the commissioners' court of Presidio County for an unlawful purpose, and were for that reason void, was bound to establish the plea as made.

PROPOSITION FIFTH.

In every case the pleading and proof must correspond. The plea of res adjudicata in the trial court being that the Su-

preme Court of Texas (affirming the judgment of the District Court) had determined that the six bonds involved in this suit were void because they were issued by an order of the commissioners' court of date December 4, 1886, for the unlawful purpose of furnishing a court house, this plea was not supported by the judgment of the Supreme Court of Texas holding simply that the interest coupons were void because they had no order of the commissioners' court to support them.

PROPOSITION SIXTH.

The cause of action in the suit of Ball, Hutchings & Co. being certain coupons which matured prior to 1893, and this suit being upon the bonds which matured in 1901, the causes of action are different. In the case of Ball, Hutchings & Co. it was simply determined that insofar as the coupons sued upon were concerned, they were not the paper of the county, as they had no order of the commissioners' court to support them; and even if the present suit had been between the same parties, the first judgment would not have precluded the proof which was made in this case that the bonds were issued by virtue of an order of and by authority of the commissioners' court of Presidio County on December 4th, 1886,—that fact having been plead by Presidio County in this case, and there being no issue in this case as to that fact.

PROPOSITION SEVENTH.

The judgment of the Supreme Court of Texas being simply upon certain coupons (aggregating $1440.00) which had matured at the time the suit of Ball, Hutchings & Co. against Presidio County was brought in the District Court of Presidio

County, in March, 1893, upon a point not in issue in this case, could not be recognized as binding the Noel-Young Bond & Stock Co. in this suit, as this suit was brought, not upon any of the same coupons, but brought upon the six bonds themselves more than ten years afterward, and the plaintiff in this suit was not a party to that case, and the subject matter of this suit was different from the subject matter in the case of Ball, Hutchings & Co. vs. Presidio County.

We will be excused for repeating that the whole of Presidio County's pleading in this case in the trial court was based upon the alleged fact that the bonds sued upon were void, for the reason that they were issued under an order of the commissioners' court, of date December 4, 1886, for the unlawful purpose of furnishing the court house; and the plea of *res adjudicata* is that the judgment of the Supreme Court of Texas was a bar because it had determined this fact (Pr. Tr. p. 8-9-10); but the judgment of the Supreme Court of Texas did not determine any such fact,—but another and different fact, towit: that the coupons sued upon in that case were void because they had no order of the commissioners' court to support them. (See 88 Tex., p. 65.)

In Nesbitt vs. Ind. District of Riverside, 144 U. S., 610-21, this honorable court has, we think, disposed of every possible difficulty that could arise in the case at bar.

In the case just cited it appears that Eleanor Nesbitt had recovered judgment against the Independent District of Riverside in a former suit on interest coupons from bonds Nos. 14 & 15, and she claimed afterward in this second suit upon certain bonds and certain other coupons, that the issues raised by the defendant in the second suit were *res adjudicata*. This honor-

able court proceeds to show that the second suit upon the bonds involved a subject matter different from the first suit upon the coupons. The court says: "Now the present suit is on causes of action different from those presented in the suit at Des Moines . . . . the cause of action on the six coupons is distinct and separate from that upon the bonds or other coupons." "While the promises of the bonds and coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond as though the two promises were placed in different instruments upon different paper." "By the rule laid down in Cromwell vs. Sac County the judgment in the suit at Des Moines is conclusive in this case only as to the matters actually litigated and determined." What were they? The defense pleaded was this: That at the time the bonds were issued the indebtdeness exceeded 5 per cent, and the bonds were therefore void; that the district received no consideration; and that the plaintiff was not a bona fide holder. The judgment entry shows that it appeared from the evidence that the indebtedness at the time the bonds were issued exceeded the constitutional limitation of 5 per cent; but that it was adjudged that the recitals in the bonds estopped the defendant from showing this fact against the plaintiff. In other words, that which was determined was the effect of the recitals."

In the case of Ball, Hutchings & Co. vs. Presidio County the Supreme Court of Texas determined the effect of the absence of an order to support the interest coupons sued up in that case. Adapting the language of this honorable court, in its opinion in the Nesbitt case, we say: "Surely an adjudica-

tion as to the effect of the fact that no order was shown to support the issuance of the coupons involved in the Ball, Hutchings & Co. case, did not preclude in the case at bar an inquiry and determination as to the effect of the fact which was proven and which was admitted in the pleading of the defendants in the case at bar,—that the bonds did have an order to support them, towit: the order of the commissioners' court of Presidio County of December 4, 1886."

In Cromwell vs. Sac County, 94 U. S., pp. 351-371, the U. S. Supreme Court held that where it was shown that one Samuel C. Smith had brought an action upon certain coupons maturing on certain bonds of the city of Sac, and that Cromwell was at the time owner of the coupons in that action, the judgment in that case could not be used as an estoppel against the prosecution of the case under consideration; the case under consideration being an action on four bonds of the County of Sac, and four coupons for interest, the suit of Smith having been brought upon certain earlier maturing coupons on the same bonds. The court proceeds to show that the suit of Cromwell against the county was a suit involving a different subject matter from the original suit of Smith, the bonds constituting the subject of the suit in Cromwell's case, and the earlier maturing coupons constituting the subject of the suit in the Smith case. The court held that although it had been adjudged in the Smith case that the plaintiff was not a holder of the coupons sued upon, for value before maturity, Cromwell had a right to show in his case against the County of Sac that he did acquire the bonds and coupons sued upon by him, for value before maturity.

In Wilmington & W. Ry. Co. vs. Alsbrook, 146 U. S., pp.

279-302, it was contended that a former judgment was a bar, and the court held that the former judgment set up was not a bar, for the reason that "the causes of action are not identical, and the points or questions *actually litigated* are not the same."

In Keokuk & W. R. R. Co. vs. Scotland Co., 152 U. S., pp. 314-15, the proposition asserted in Cromwell vs. Sac County is adhered to, and the court makes the matter more clear, if possible, by saying: "If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit, etc., but where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel as to those matters *in issue or points controverted upon the determination of which the finding or verdict was rendered.*"

Suppose that this action had been brought by Ball, Hutchings & Co. upon the six bonds, and Presidio County had plead as in this case that the six bonds were issued on December 6th, 1886, under an order of the cimmissioners' court, how could it be claimed that the judgment of the Supreme Court of Texas, based upon a contrary finding of fact, would bar a recovery? Would a court ignore the defendant's own pleading, and in the very face of its pleading find that a former judgment was conclusive upon a fact the very contrary of that alleged by the defendant?

The opinion of the Supreme Court of Texas in the case of Ball, Hutchings & Co. vs. Presidio County, 88 Texas, p. 65, after referring to the order of February 9, 1886, referred to on the face of the bonds, shows that the order authorized the issuance of 86 bonds, and required that they should be dated within ten

days from February 9, 1886, and that this order of Feb. 9th was satisfied by certain bonds numbers 1 to 60, issued on February 11, 1886, and numbers 61 to 86 issued on February 15, 1886; and the court says: "This fully satisfied the order, and said ten bonds subsequently issued were in fact without an order to support them, and therefore in law void." Now of course if the ten bonds were without an order to support them, they would be void, because they would not be the paper of Presidio County; but if the bonds were issued by virtue of an order of the commissioners' court of Presidio County, they would be the paper of Presidio County without regard to the purposes for which they may have been issued. We submit, that the reasoning of the Supreme Court of Texas which follows this finding of fact, that is the reasoning based upon the proposition that the law requires a dealer in county bonds to know the contents of the order of the commissioners' court authorizing their issuance is a mere obiter dictum as to an abstract proposition and is not supported as a proposition of commercial law anywhere outside of the state of Texas; and, as we have already remarked and will hereafter show, such a proposition of commercial law has been directly denounced by this honorable court, and it has been denounced by all the federal courts to whose opinions we have had access.

PROPOSITION EIGHTH.

No question having been raised in this case as to power of the commissioners' court of Presidio County to issue the bonds sued upon; and it being shown that they were issued under an order of the commissioners' court, of December 4, 1886, and that they recited upon their face that they had been issued for

the lawful purpose of building a courthouse, and full value having been paid for them by the original purchasers without any notice to the contrary, the only issue raised by the pleadings was whether or not they should be declared void because they were in fact issued for the unlawful purpose of furnishing the courthouse; and the trial court, and the U. S. Circuit Court of Appeals, did not err in determining that the purchaser of the bonds had a right to rely upon the truth of the recitals.

PROPOSITION NINTH.

The false recital in the bonds as to the date of the order under which they were issued, whether intentional or inadvertent, would not bind a purchaser with notice of the fact that the bonds were issued for an unlawful purpose, and would not affect a purchaser who relied upon the recital that they were issued for a lawful purpose.

PROPOSITION TENTH.

As the bonds recite upon their face that they were issued in accordance with and by virtue of the statutes of Texas, which are mentioned in the same, and purport upon their face to have been issued by virtue of the statutes mentioned in the same, for the purpose of erecting a courthouse and jail, any purchaser of the bonds in the open market had a right to rely upon and would be protected by the recitals in said bonds; and there being no evidence whatever that the commissioners' court of Presidio County did not have the power to issue bonds of such a nature, any purchaser of such bonds in the open market would be protected, and would not be chargeable with knowledge of the fact the bonds were issued for a purpose other than that mentioned in the bonds.

The six bonds sued upon in the case at bar were numbers 90, 92, 94, 95 and 96, all of date December 6, 1886, maturing fifteen years after their date, towit: in December, 1901. These bonds all contained the following recitals: "This bond is issued by virtue of an Act of the Legislature of Texas entitled an Act to authorize the County Commissioners' Court of the several counties of the State to issue bonds for the erection of a courthouse, and to levy a tax to pay for the same." Approved February 11, 1881, and by virtue of the provisions of Chapter 17 laws of called session of the Eighteenth Legislature, which said chapter has since been validated by the Act of March 27, 1885, authoring the County Commissioners' Court of the several counties of the State to issue bonds for the erection of a county jail, and by order of the County Commissioners' Court of said County of Presidio, on the 9th day of February, 1886, and is redeemable before maturity at the pleasure of the County." (Pr. Tr. p. 24.)

The order of the commissioners' court of date Dec. 4, 1886, was introduced in evidence in this case, and this was supplemented by the testimony of J. S. Catlin, the County Judge of Presidio County at the time the bonds were issued, and who signed the bonds as County Judge, and he testified in this case that he was present in the commissioners' court at the time, and the bonds were issued by the commissioners' court in payment for furniture. (See page 17 this Brief.)

The great fallacy which underlies every proposition asserted by the petitioner, is that an improper exercise of power is the same as a total want of power. In this case there is no question of power raised. The Acts of the Legislature of Texas gave the power to the commissioners' court to issue such bonds

very explicitly, and there is not even an intimation in the record that these bonds sued upon were issued in excess of the amount that could have been issued by the commissioners' court under the law. The presumption of the law is that the Noel-Young Bond & Stock Co. acquired the bonds before maturity for value without notice, and there is no pleading upon the part of defendant that they did have notice, but the pleading is that they were chargeable with notice of the contents of the order of Dec. 4, 1886, and were bound to know that the bonds sued upon had been issued for an unlawful purpose. The undisputed evidence showed affirmatively that Frank Bell and J. C. League were purchasers of the bonds as far back as December, 1886, for value without notice, and any person whosoever purchasing the bonds afterward would be protected and would have all the rights of a purchaser for value without notice. (See Pr. Tr. p. 27 and 28.)

The law is stated very clearly in Pickens Township vs. Post, 99 Fed. Rep., p. 650, where the Circuit Court of Appeals of the Fourth Circuit uses the following language: "The holder of a negotiable instrument is presumed to have taken it before maturity for a valuable consideration and without notice of any objection to which it is liable, and this presumption stands until overcome by sufficient proof," citing Swift vs. Titson, 16 Peters, p. 1; Chambers County vs. Clews, 21 Wallace, p. 317; Montclair Township vs. Leahaffy, 96 U. S., p. 312.

If the proposition that a purchaser of municipal bonds is bound to know the contents of the order under which they are issued is the law, then this honorable court, and the U. S. Circuit Courts of Appeals, have upheld bonds for many millions

of dollars that were invalid; but this court has never recognized such a proposition.

The plaintiff in the trial court says the bonds sued upon recite that they were issued for a lawful purpose, to-wit: to build a courthouse; and the county is estopped by the full recitals about their purpose. The county answers by saying our commissioners' court falsely and fraudulently recited that they were issued under an order of date February 9, 1886, and the purchaser was bound to discover from the face of the bond that this recital was false, and that they were in fact issued for an unlawful purpose.

In Chaffee Co. Coms. vs. Potter, 142 U. S., pp. 355-366, it is said: "The true test is, what does each individual bond disclose?" Each individual bond in the case at bar disclosed that it was for the sum of $1000.00, and was issued in conformity with statutes of Texas for the purpose of building a courthouse; but the argument of counsel for Presidio County is that the bond contains a false recital, to-wit: that it was issued under an order of February 9, 1886, and if the purchaser had examined that order, and the record of the commissioners' court of December, 1886, he would have seen that the recital that the bonds was issued for the purpose of building a courthouse was false, and he would have discovered that the bond was issued for the unlawful purpose of buying furniture.

It must be borne in mind that there was not at the time these bonds were issued, and never has been, any statute in Texas requiring bonds to show upon their face the ordinance or resolution under which they might be issued, and the false recital about the order and its date was put into these bonds gratuitously.

The case of Nolan County vs. the State, 83 Texas, p. 182-201, was decided in the year 1892. In that case it appeared that Nolan County bonds numbers 1 to 4 were issued in April, 1882, to Martin, Burns & Johnson, in payment for a jail. At that time the county had no power to issue bonds to pay for a jail. The bonds, however, recited upon their face that they were issued for the purpose of building a courthouse,—which was a lawful purpose. The order of the commissioners' court of Nolan County, of date April 5, 1882, under which the bonds were issued, showed that they were issued for the purpose of building a jail (see 83 Texas, 185.) The Supreme Court of Texas held that in view of the recitals upon the face of the bonds, the purchaser was bound to look no further; "he had the right to rely upon the truth of such recitals, and having paid value for the bonds without actual knowledge of the illegality, the county would be estopped to set up that they were not issued for the purpose for which they purported to be issued," citing several cases from the Supreme Court of the United States, all sustaining the very position for which we are now contending.

In Waite vs. Santa Cruz, 184 U. S., pp. 302-329, it was contended in behalf of the City of Santa Cruz that the purchaser of certain bonds and coupons was bound to know the contents of the order or ordinances under which the bonds were issued, and that being chargeable with knowledge of the contents of the order or ordinances under which the bonds were issued, they having been issued for an unlawful purpose, he could not claim that the bonds were the valid obligation of the city. The Supreme Court held that as such bonds contained recitals to the effect that they were issued by virtue of the Charter of

the City empowering it to borrow money, etc., the City could not be heard to say to the contrary. The court says, citing the case of Marshall County vs. Schenck, 5 Wallace, p. 772: "It would be the grossest injustice and in conflict with all the past utterances of this court to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations made through official agents and under its corporate seal as to the purpose for which these bonds were issued. Whether such representations were made inadvertently or with the intention, *by the use of inaccurate titles of ordinances,* to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case the city, both upon principal and authority, is cut off from any such defenses." The court then cites the case of Evansville vs. Dennet, 161 U. S., pp. 434-443, which holds that a purchaser of bonds such as the bonds involved in the case at bar containing such recitals as in the case at bar, was protected by such recitals, and that he was not bound to examine the records or ordinances or to know from the contents of the records or ordinances under which the bonds were issued, that they were issued for an improper purpose.

In Evansville vs. Dennet, 161 U. S., pp. 434-446, the court also says, referring to municipal bonds such as those involved in the case at bar, recitals by the municipal officers "that bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of' the statute, have been held in favor of bona fide purchasers for value, to purport full compliance with the statute and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were

issued." The court proceeds to say that on account of such recitals purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power, etc.; with such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature.

In Stanley County Commissioners vs. W. N. Coler & Co., 190 U. S., pp. 442-444, the court again declares that recitals in such bonds to the effect that the bonds have been issued "in pursuance of," or "in conformity with," or "by virtue of," or "by authority of" the statute, imported full compliance with the statute in favor of bona fide purchasers for value, and precluded inquiry as to whether the precedent conditions had been performed before the bonds were issued.

In this same case Stanley County Commissioners vs. W. N. Coler & Co., the argument was made that the federal courts should recognize themselves as bound by the decisions of the state court of North Carolina in construing the state constitution and the statutes, but the U. S. Supreme Court said that it was not bound to follow the decisions of the Supreme Court of that state. The question presented was regarded as one of commercial law and general jurisprudence, and the right to exercise its own judgment was asserted, and the court says, mentioning some cases in which the point has been passed upon: "It is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence." The court says further: "The bonds were expected to be offered in the financial markets of the other states of the union, even of-

fered in the financial markets of the world. They were payable to bearer. They were expected to have, and their value to an extent depended upon their having, almost the currency and sanction of money—the affairs of a county can only be administered by its officers, and to their attention and duty its interests must be entrusted. When the power to issue bonds, therefore, depends upon the existence of local conditions, the local officers are charged with the duty and the responsibility of ascertaining them, and the presumption that the duty was exercised should and does accompany and guarantee the bonds in every financial market."

See also Venice vs. Murdock, 92 U. S., pp. 494-502.

In Pince Grove Township vs. Talcott, 86 U. S., pp. 666-679, this honorable court said: "The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise; it must hear and determine for itself. Here commercial securities are involved. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary."

In Board of Supervisors of Marshall County against Schenck, 72 U. S., pp. 772-785, this honorable court held that the question of the validity of municipal bonds in the hands of innocent holders without notice, is a question of commercial law in which the state adjudications, although entitled to great respect, do not furnish the rule of decision in this court."

In the case at bar great stress is laid upon the fact that the bonds recite that they were issued under an order of the commissioners' court of Presidio County, of date February 9, 1886; and the claim is made that an inspection of that order would have shown that the bonds were issued for an unlawful purpose. As we have already shown, this honorable court held in the case of Waite vs. Santa Cruz, 184 U. S., pp. 302-329, that whether such a false representation by the use of an inaccurate title was made inadvertently or with the intention to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, both upon principle and authority, the municipality is cut off from any such defense.

In Evansville vs. Dennet, 161 U. S., pp. 434-446, this whole matter is passed upon, the case having been certified by the judges of the U. S. Circuit Court of Appeals for the 7th Circuit. The second question was, "Does the recital in the series of bonds issued to the Evansville, Carmi & Paducah R. R. Co. that they were issued 'by virtue of a resolution of said council passed May 23, 1876,' put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms?" This court answered this second question in the negative.

In Waite vs. Santa Cruz, 184 U. S., p. 320, to which we have already referred, the court says: "Purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded; they were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the

ordinances would disclose nothing in conflict with the recitals in the bonds."

In the County of Scotland vs. Hill, 132 U. S., pp. 107-117, it is held that the ownership of county bonds by any prior holder under such circumstances as would protect that holder against any defense by the county, entitles a subsequent purchaser to recover even if he, when afterwards purchasing them, had knowledge of the pendency of a suit involving their validity; and whenever negotiable paper has passed into the hands of a party unaffected by pre vious infirmities, its character as a valuable security is established, and its holder can transfer it to others with the like immunity.

In Orleans vs. Platt, 99 U. S., p. 676, the Supreme Court says: "The bonds in question have all the properties of commercial paper, and in the view of the law they belong to that category—this court has uniformly held, when the question has been presented, that where a corporation has lawful power to issue such securities and does so, the *bona fide holder has the right to presume the power was properly exercised, and is not bound to look beyond the question of its existence.* Where the bonds on their face recite the circumstances which bring them within the power of the corporation, it is estopped to deny the truth of the recital," citing many cases.

In Board of Commissioners vs. National Life Insurance Company, 90 Fed. Rep., p. 231, the U. S. Circuit Court of Appeals of the Eighth Circuit, in speaking of county bonds where a defense was made such as is made in the case at bar, and that bonds referred to an order showing their issuance for an unlawful purpose, says: "The recital in the bonds that they were issued in accordance with the provisions of the statute, imports

that they were issued in pursuance of a lawful and proper resolution and an honest and just action on the part of the board of county commissioners under that statute. It relieves the innocent purchaser of all inquiry, notice and knowledge of the actual action and *record* of the board, and estops the county from denying that the proper action was taken and that a lawful resolution was passed," citing many cases.

In the case of Village of Kent vs. Dana, 100 Fed. Rep., p. 60 (Cir. Ct. Ap. 6th Cir.) it appears that the Village of Kent issued certain bonds, reciting that they were issued "for the refunding of its indebtedness" (a lawful purpose); but the bonds were in fact issued for the unlawful purpose of promoting a glass factory. The court held, following Evansville vs. Dennitt, supra, that the Village of Kent was cut off by the recital in the bonds from making the defense that they were issued for an unlawful purpose.

In Risley vs. Village of Howell, 64 Fed. Rep., p. 53 (U. S. Cir. Ct. of Ap. 6th Cir.) it appears that the Village of Howell issued certain bonds reciting upon their face that they were "public improvement bonds." The bonds were in fact issued for the purpose of aiding a railroad, "in the teeth of the express holding of the Supreme Court of Michigan." The bonds recite that they were issued "under the ordinance of the Village of Howell, passed August 12, 1885." An inspection of this ordinance would have shown that the bonds were issued for the unlawful purpose. The Circuit Court of Appeals, 6th Circuit, reviews a number of casese from this honorable court, showing that the purchaser was not bound to know the contents of the ordinance, although the ordinance was referred to by its date

on the face of the bonds, but was protected by the recital that the bonds were issued for a lawful purpose.

If this Honorable Court should determine to review the judgment of our Circuit Court of Appeals upon the assignments of error which we contend are in violation of Rule No. 11, still we respectfully submit that the judgment of that court should be affirmed.

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